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State v. Fernandez Appellant's Brief Dckt. 42370

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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 42370
Plaintiff-Respondent,)	
)	JEROME COUNTY NO. CR 2013-4134
v.)	
)	
THOMAS FERNANDEZ,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF JEROME

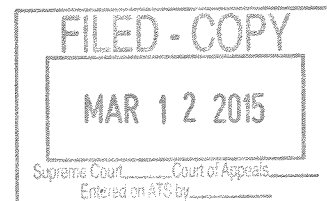
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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature of the Case	1
Statement of the Facts and Course of Proceedings	1
ISSUE PRESENTED ON APPEAL	6
ARGUMENT	7
The District Court Erred, And Violated Mr. Fernandez's Constitutional Right To Present A Complete Defense, When It Held That Expert Testimony About The Potential For Inaccurate Breath Test Results Due To Mr. Fernandez's Diabetes And GERD Was Not Relevant	7
A. Introduction	7
B. Standard Of Review	7
C. The District Court Violated Mr. Fernandez's Constitutional Right To Present A Complete Defense Because His Expert's Testimony Was Relevant And Should Have Been Presented To The Jury	8
1. Because Mr. Fernandez Has Diabetes, The District Court Erred When It Held That Expert Testimony Regarding The Intoxilyzer 5000's Potential For Inaccurate Results Caused By Problems With Detecting Diabetes-Related Alcohol Was Not Relevant	8
2. Because Mr. Fernandez Has GERD, The District Court Erred When It Held That Expert Testimony Regarding The Intoxilyzer 5000's Potential For Inaccurate Results Caused By Mouth Alcohol Related To GERD Was Not Relevant	12
CONCLUSION	14
CERTIFICATE OF MAILING	15

TABLE OF AUTHORITIES

Cases

<i>In re Oliver</i> , 333 U.S. 257 (1948)	8
<i>North Carolina v. Alford</i> , 400 U.S. 25 (1970).....	5
<i>State v. Field</i> , 144 Idaho 559 (2007)	9
<i>State v. Kerchusky</i> , 138 Idaho 671 (Ct. App. 2003)	8
<i>State v. Raudebaugh</i> , 124 Idaho 758 (1993)	7
<i>Washington v. Texas</i> , 388 U.S. 14 (1967)	8

Rules

I.R.E 401	9
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STATEMENT OF THE CASE

Nature of the Case

Thomas Fernandez appeals from the district court's order granting the State's motion in limine, which requested that the district court prevent Mr. Fernandez's expert witness from testifying. Mr. Fernandez was charged with driving under the influence of alcohol, and the expert witness proposed to testify regarding potential problems in the scientific methodology underlying the design of the device used to measure Mr. Fernandez's breath alcohol concentration when he was arrested. The witness also proposed to testify regarding accuracy problems of alcohol breath testing for people who are diabetic or suffer from gastro-esophageal reflux disease. In short, the witness was going to explain how any of those three issues could have led to inaccurate breath test results for Mr. Fernandez. After a hearing, the district court granted the motion. Mr. Fernandez then entered a conditional plea of guilty to driving under the influence of alcohol, preserving his right to appeal the district court's memorandum decision on the State's motion in limine. On appeal, Mr. Fernandez asserts that the district court abused its discretion when it granted the State's motion.

Statement of the Facts and Course of Proceedings

On August 1, 2013, at 12:55 p.m., Jerome Police Officer Summers reported that he stopped Mr. Fernandez's vehicle for failing to stop at a stop sign. (R., p.18.) Officer Summers said that Mr. Fernandez could not provide proof of valid insurance and was not wearing his seatbelt. (R., p.18.) When Officer Summers was explaining the citation to Mr. Fernandez, he said that he noticed a smell of alcohol and that Mr. Fernandez's eyes were "bloodshot and watery." (R., p.18.) Officer Summers also said that Mr. Fernandez appeared to be nervous, sweating heavily, and mumbling when he

spoke. (R., p.18.) When asked if he had been drinking, Mr. Fernandez said he had consumed a lot of alcohol the night before. (R., p.18.) Mr. Fernandez told Officer Summers that he was hesitant to take a breath test because he thought he would “blow over” the legal limit as a result of his liver problems. (R., pp.18-19.) However, he later agreed to the breath test, and the results from the two samples were .169/.171. At the preliminary hearing, Officer Summers testified that Mr. Fernandez had told him that he not only had problems with his liver, but that he was also a diabetic. (R., p.383.)

Mr. Fernandez was charged with driving under the influence of alcohol; this was charged as a felony because Mr. Fernandez had two prior felony convictions for driving under the influence in the previous fifteen years. (R., pp.64-68.) The State also sought a persistent violator enhancement. (R., pp.69-70.) Mr. Fernandez originally pleaded not guilty, and the district court granted him funding to hire an expert to challenge the accuracy of the breath testing.¹ (R., pp.136-37.) The witness (Dr. Anderson) indicated in his initial report that he would offer testimony regarding accuracy problems with the type of machine that Officer Summers used to analyze Mr. Fernandez’s breath sample, the Intoxilyzer 5000. (R., pp.294-98.) Additionally, he would offer testimony about how the accuracy Mr. Fernandez’s breath testing results could be negatively impacted by his diabetes and gastro-esophageal reflux disease (*hereinafter*, GERD). (R., pp.294-98.)

Subsequently, the State filed a motion in limine to prevent Dr. Anderson from testifying on those subjects. (R., pp.304-05.) In that motion, the State argued that testimony “about the general reliability of the Intoxilyzer 5000” would “contradict Idaho case law.” (R., p.304.) Further, the State argued that if Dr. Anderson testified about “GERD and Diabetic Ketoacidosis as outlined in his report” it would be “irrelevant,

misleading and confusing to the jury.” (R., p.304.) The district court set a date for a hearing on the motion in limine, and, apparently in response to the district court’s request, Mr. Fernandez’s counsel filed an offer of proof that provided more detail regarding the nature of Dr. Anderson’s proposed testimony. (R., pp.310-12.) Mr. Fernandez attached two exhibits to the offer of proof: a diabetic record chart and a blood sugar results chart, which showed dramatic variations in Mr. Fernandez’s blood sugar levels in the days following his arrest and showed that, despite the fact that he was taking insulin, his blood sugar levels varied dramatically over the course of a day. (R., pp.310-12.)

The State then filed an offer of proof indicating that it had rebuttal witnesses available. (R., pp.319-22.) For example, the offer stated that it would offer the testimony of Dr. Jeff Keller, who had been treating Mr. Fernandez since his incarceration and would testify that Mr. Fernandez’s diabetes was being treated without insulin and ketoacidosis “only occurs” in people with Type 1 diabetes, and Mr. Fernandez could not have had ketoacidosis because ketoacidosis is such a serious illness that victims must be hospitalized in order to recover.² (R., p.319.) Also, Matt Aguirre, the nurse who treated Mr. Fernandez at the jail in the evening after he was arrested, would testify that Mr. Fernandez was not in a state of ketoacidosis.³ (R., pp.319-20.)

¹ The expert identified in the motion was Michael Hlastala, Ph.D., but Joseph Anderson Ph.D. was substituted later. (See R., pp.272-81.)

² In its Memorandum Decision, the district court found that Mr. Fernandez did take insulin to manage his diabetes, and people with Type 2 diabetes can experience ketoacidosis. (R., pp.387-88.)

³ The State’s offer of proof also included another potential witness, Jeremy Johnston, who would testify regarding the Intoxilyzer 5000’s ability to detect and accommodate for the presence of acetone (one result of diabetic ketoacidosis) in the breath. (R., p.320.)

After a hearing, the district court granted the State's motion in limine. (See R., pp.382-91.) In its memorandum decision, it found that Dr. Anderson's testimony would focus on three main issues. First, that "[t]he results of the Intoxilyzer 5000 breath tests are not accurate or reliable because the design of the machine does not measure or control certain human factors which may affect the accuracy of the breath tests for alcohol." (R., p.383.) Second, "[t]hat the defendant takes insulin to manage his diabetes and diabetes can produce acetone and isopropanol at elevated levels and that while the Intoxilyzer 5000 can identify such as an interferent, the detection system does not always work and when not identified the alcohol levels are falsely elevated." (R., p.384.) And third, "[t]hat the defendant suffers from heartburn which is treated with medication. That the heartburn is caused by acid reflux (GERD) and that liquid and gaseous alcohol in the stomach . . . can flow into the mouth and that mouth alcohol will increase breath alcohol concentrations," and the Intoxilyzer 5000 may not always identify mouth alcohol accurately. (R., p.384.)

In regards to Dr. Anderson's potential testimony on how "human factors" could negatively affect the general accuracy and reliability of the Intoxilyzer 5000 machine, the district court held that such testimony was not supported by Idaho case law and would thus not be "relevant and therefore not admissible." (R., p.386.) In regards to Dr. Anderson's potential testimony about the effect Mr. Fernandez's diabetes might have had on the breath samples, the district court held that such testimony was not "admissible absent proof that the defendant at the time of the breath test was suffering

Mr. Johnston would also testify regarding GERD's impacts on breath testing. (R., pp.320-21.)

from elevated blood sugar levels/ketoacidosis.”⁴ (R., p.389.) Finally, in regards to the potential testimony about Mr. Fernandez’s GERD and its effects on his breath testing, the district court said that “absent proof that the defendant has previously been diagnosed with GERD, testimony relative to the effects of GERD on the breath alcohol test would not be relevant and therefore inadmissible.” (R, p.390.) Additionally, it said that “the studies indicate that for GERD to be an issue there must be proof that there was ‘unabsorbed alcohol in the stomach’ of the defendant.” After analyzing those studies, it said, “[i]n this case, there is no evidence of recent consumption of alcohol before the defendant submitted to the breath test. Therefore, absent proof that the defendant recently consumed alcohol prior to the breath test and/or he had unabsorbed alcohol in his stomach, the testimony of GERD would not be relevant.” (R., pp.390-91.) Based on these findings, the district court granted the State’s motion.

Subsequently, pursuant to a plea agreement, Mr. Fernandez entered conditional *Alford*⁵ pleas to felony driving under the influence, and the persistent violator enhancement. (Tr. 6/2/14, p.12, L.20 – p.13, L.19.) The pleas preserved his ability to appeal the district court’s memorandum decision regarding the State’s motion in limine. (R., pp.436-42.) Later, the district court imposed a sentence of fifteen years, with two and a half years fixed. (Tr. 7/21/14, p.56, Ls.13-15; R., p.440.) Mr. Fernandez then filed a Notice of Appeal that was timely from the judgment of conviction. (R., pp.447-51.)

⁴ The district court said that there had been “no evidence proffered or offered to show: (1) what the defendant’s blood sugar levels were at the time of the traffic stop or before or during the breath test; (2) a medical diagnosis of Type I diabetes; (3) a medical diagnosis of GERD; or (4) that the defendant was experiencing acid reflux during or before the administration of the breath test. (R., p.384, n.3.)

⁵ *North Carolina v. Alford*, 400 U.S. 25 (1970).

ISSUE

Did the district court err, and violate Mr. Fernandez's constitutional right to present a complete defense, when it held that expert testimony about the potential for inaccurate breath test results due to Mr. Fernandez's diabetes and GERD was not relevant?

ARGUMENT

The District Court Erred, And Violated Mr. Fernandez's Constitutional Right To Present A Complete Defense, When It Held That Expert Testimony About The Potential For Inaccurate Breath Test Results Due To Mr. Fernandez's Diabetes And GERD Was Not Relevant

A. Introduction

The district court erred when it held that expert testimony to show how Mr. Fernandez's diabetes or GERD may have affected his breath test results was not relevant because there were enough facts presented to support the existence of those conditions. Evidence showing how the results of Mr. Fernandez's breath test could have been skewed by his diabetes and/or GERD certainly would have a tendency to make the accuracy of his breath test less probable. As such, Dr. Anderson should have been allowed to testify on these issues. Mr. Fernandez had a constitutional right to present his defense. Therefore, his conviction must be vacated because the erroneous exclusion of his expert witness's testimony violated Mr. Fernandez's due process rights.

B. Standard Of Review

"[T]he relevancy of evidence is not a discretionary matter. There is no issue of credibility or finding of fact that must be resolved in order for the trial court to reach a decision on relevancy. Therefore, this Court will review the question of relevancy de novo." *State v. Raudebaugh*, 124 Idaho 758, 764 (1993).

C. The District Court Violated Mr. Fernandez's Constitutional Right To Present A Complete Defense Because His Expert's Testimony Was Relevant And Should Have Been Presented To The Jury

The right to present a defense is protected by the Sixth Amendment of the United States Constitution and made applicable to the states through the due process clause of the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14, 19 (1967). "This right is a fundamental element of due process of law." *Id.* The right to present a defense includes the right to offer testimony of witnesses, compel their attendance, and to present the defendant's version of the facts "to the jury so it may decide where the truth lies." *Id.* In *In re Oliver*, 333 U.S. 257 (1948), the United States Supreme Court described what it regarded as the most basic ingredients of due process of law:

A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

Id. at 273. When the defendant has been denied a fair opportunity to defend against the charge, the conviction must be overturned. *State v. Kerchusky*, 138 Idaho 671 (Ct. App. 2003).

1. Because Mr. Fernandez Has Diabetes, The District Court Erred When It Held That Expert Testimony Regarding The Intoxilyzer 5000's Potential For Inaccurate Results Caused By Problems With Detecting Diabetes-Related Alcohol Was Not Relevant

Mr. Fernandez was denied the opportunity to present his defense to the charge of driving under the influence of alcohol because the district court found that he had presented no proof of elevated blood sugar levels or ketoacidosis at the time of his breath test. (See R., p.389.) Therefore, it said that any testimony of the expert based

on his knowledge of Mr. Fernandez's illnesses would not have been relevant and thus inadmissible. (R., p.389.)

Evidence that is relevant to a "material and disputed issue concerning the crime charged" is typically admissible. *State v. Field*, 144 Idaho 559, 596 (2007). Any evidence that has any "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" is relevant. I.R.E 401.

The undisputed facts show that Mr. Fernandez could provide evidence of his diabetes, his fluctuating blood sugar levels, and the effect of elevated blood sugar on his breath test results. (See R., pp.310-14.) The State could provide evidence to the contrary. (R., pp.319-21.) Therefore, this was clearly a jury issue. Because Mr. Fernandez has diabetes, all this evidence was relevant to the jury's determination of the accuracy of his breath test results.

Nevertheless, in its Memorandum Decision, the district court stated that "assuming that the defendant could experience ketoacidosis, there has been no evidence presented to establish that the defendant was experiencing the symptomology of ketoacidosis." (R., p.388.) Further, it said that "it is apparent from the medical literature that production of acetone or ketones in the blood is the product of elevated blood sugar levels and the evidence presented suggests that Mr. Fernandez on August 1, 2013 did not have elevated blood sugar levels since his blood sugar the evening of his arrest around 7:30 p.m. was 123 which would be in the normal range." (R., p.388.) The district court went on to say that "the testimony of Dr. Anderson as to the defendant's diabetes and the effect his condition may have had on the results of the breath test are not admissible absent proof that the defendant at

the time of the breath test was suffering from elevated blood sugar levels/ketoacidosis.” (R., p.389.) Therefore, the district court denied Dr. Anderson’s testimony on this issue and said it was not competent or relevant and therefore, not admissible. (R., p.389.)

The district court improperly focused on the weight of the evidence, not its admissibility. Indeed, the district court clearly wanted proof positive of Mr. Fernandez’s blood sugar levels at the time of the breath test before it would admit the evidence. This information was impossible to obtain and, given that Mr. Fernandez presented charts showing his fluctuating blood sugar levels, a jury should have made the determination as to the impact of that evidence and the State’s rebuttal evidence. A reasonable juror could certainly infer from those charts that Mr. Fernandez had elevated blood sugar levels at the time of his breath test. Given these fluctuations, the fact that his blood sugar was normal some six hours after his breath test was relevant but, as the district court admitted, did not prove that his blood sugar was normal at the time of the breath test. Again, the district said that “the evidence presented *suggests* that Mr. Fernandez on August 1, 2013 did not have elevated blood sugar levels. . . .” (R., p.388, (emphasis added).) That statement meant the evidence obviously had a tendency to make a fact in issue more or less probable. Therefore, it was relevant.

Additionally, it is clear from the transcript of the hearing on the motion in limine that Dr. Anderson was depending on Mr. Fernandez’s medical records to reach the conclusions he did. (Tr. p.21, Ls.1-7.) The State, and the State’s doctor who was treating Mr. Fernandez while he was incarcerated, did not have some of these medical records. (Tr. p.21, L.8 – p.22, L.1.) Further, the district court’s questions regarding Dr. Anderson’s proposed testimony indicated that the district court was evaluating the weight of the testimony, not its admissibility. For example, when questioning

Mr. Fernandez's counsel about the Intoxilyzer 5000's potential for failure in detecting interferences caused by diabetic conditions, the district court asked:

THE COURT: Is he [Dr. Anderson] going to testify as to the percentage of time that it fails?

COUNSEL: Yes

THE COURT: And what is his testimony going to be as to percentage?

COUNSEL: I don't have that in front of me, Judge. I didn't realize I needed his entire litany of testimony for this offer of proof.

THE COURT: Well, my understanding is what's in his report is what he is going to testify to.

COUNSEL: Yes

THE COURT: He didn't include that percentage. Isn't that relevant to determine the reliability of his opinion? For example, if he were to tell me that it happens two percent of the time –

COUNSEL: Right. And I believe those are questions appropriate for cross examination and, again, go to weight, not admissibility. The prosecutor is more than welcome to bring up the fact whether he can or can't provide those percentages. If the Court wants me to determine whether or not he can provide that prior to trial so the State can make that determination, I'm happy to do so; however, again, it goes to weight, not admissibility.

(Tr., p.23, L.8 – p.24, L.6.)

Evidence that showed how the results of Mr. Fernandez's breath test could have been affected by his diabetes certainly would have a tendency to make the accuracy of his breath test results less probable. Therefore, such evidence was relevant. The district court's detailed questions regarding the reliability of Dr. Anderson's opinion were outside the scope of a determination of the general relevance of Dr. Anderson's proposed testimony. As such, the district court violated Mr. Fernandez's right to present a complete defense.

2. Because Mr. Fernandez Has GERD, The District Court Erred When It Held That Expert Testimony Regarding The Intoxilyzer 5000's Potential For Inaccurate Results Caused By Mouth Alcohol Related To GERD Was Not Relevant

Mr. Fernandez was denied the opportunity to present his defense to the charge of driving under the influence of alcohol because the district court found that he had presented no evidence that he had been formally diagnosed with GERD and no “proof that the defendant had recently consumed alcohol prior to the breath test and/or he had unabsorbed alcohol in his stomach.” (R., p.384, n.3, pp.390-91.)

The undisputed facts show that Mr. Fernandez could provide evidence of his GERD diagnosis, and of the potential effect it had on his breath test results. (See Tr., p.26, L.22 – p.27, L.7.) The State could provide evidence to the contrary. (R., pp.319-21.) Therefore, this was clearly a jury issue.

Nevertheless, in its Memorandum Decision, the district court stated:

It is clear that GERD is a specific medical diagnosis and absent proof that the defendant has previously been diagnosed with GERD, testimony relative to the effects of GERD on the breath alcohol test would not be relevant and therefore inadmissible.

Further, the studies indicate that for GERD to be an issue there must be proof that there was ‘unabsorbed alcohol in the stomach’ of the defendant. Dr. Anderson in his report does not state when it was that the defendant last consumed any alcohol prior to his arrest and whether the defendant still had any alcohol in his stomach at the time of his breath test. Dr. Hlastala, a colleague of Dr. Anderson, in his study of the effectiveness of the ‘slope detector’ and specifically with respect to a person with a diagnosis of GERD only opines that it is ‘possible’ that the condition of GERD could elevate a breath alcohol test, although most of the studies he cites to are of the opinion that the undetected presence of alcohol in the mouth is not probable. These studies were based on recent consumption of alcohol prior to administration of the breath test.

(R., p.390.)

However, if it was indeed “possible” that GERD could elevate a breath alcohol test, then Mr. Fernandez should have been allowed to present his case to a jury.

Clearly, Dr. Anderson, in his report, did not need to lay out all the facts that were relevant to Mr. Fernandez's defense in order for the district court to determine whether his testimony could be relevant.

In regards to whether there was a prior diagnosis of GERD, the district court asked Mr. Fernandez's counsel the following:

THE COURT: Dr. Anderson, in his report, states that he's been provided with Mr. Fernandez's medical records. The medical records provided, is there a physician that has previously diagnosed Mr. Fernandez with GERD?

COUNSEL: No. I think there is an assumption made based on the continuing prescriptions of omeprazole.

THE COURT: So there is – am I correct there is no prior diagnosis of GERD?

COUNSEL: There is a prior diagnosis of GERD. I just don't know that I got that specific medical record making the diagnosis, but Mr. Fernandez was diagnosed with GERD 20 years ago.

THE COURT: Who's going to testify to that?

COUNSEL: Your Honor, I hadn't even thought about it. I didn't realize it was an issue that he did or didn't have GERD. I don't know that the State's challenged that. They continue to prescribe – their own doctor continues to prescribe omeprazole for acid reflux while Mr. Fernandez is in custody.

(Tr., p.26, L.11 – p.27, L.7.)

The district court's finding that there was no evidence presented that Mr. Fernandez had consumed alcohol recently also raised an issue for the jury to determine. Mr. Fernandez's counsel explained why this issue had to be put in front of a jury:

[G]oing back to the State's argument, we're, again, talking about weight here, they would take a position, because of Mr. Fernandez's statements there was no alcohol in the stomach – which to me, I take a position if there's no alcohol in the stomach, and you believe that he had stopped

drinking the night before, how do we know that these results are accurate? Those are questions for the jury: Whether or not they find the information that Dr. Anderson presents with regard to that credible, or whether or not they believe the State's rebuttal expert.

(Tr. p.25, L.24 – p.26, L.10.)

Evidence that showed how the results of Mr. Fernandez's breath test could have been affected by his GERD certainly would have a tendency to make the accuracy of his breath test results less probable. Therefore, such evidence was relevant. The district court's detailed analysis, in terms of what was not included in Dr. Anderson's report, was outside the scope of a determination of the general relevance of Dr. Anderson's testimony. As such, the district court violated Mr. Fernandez's right to present a complete defense.

CONCLUSION

Mr. Fernandez respectfully requests that this Court vacate his conviction and remand his case for further proceedings.

DATED this 12th day of March, 2015.

A handwritten signature in black ink, appearing to read 'R. P. Anderson', written over a horizontal line.

REED P. ANDERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of March, 2015, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

THOMAS FERNANDEZ
INMATE #65081
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JOHN K BUTLER
DISTRICT COURT JUDGE
E-MAILED BRIEF

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Hand delivered to Attorney General's mailbox at Supreme Court.

A handwritten signature in black ink, appearing to read "EAS", written over a horizontal line.

EVAN A. SMITH
Administrative Assistant

RPA/eas